EVAN CHUKWAK

IBLA 75-554 Decided May 13, 1980

Appeal from the decision of the Alaska State Office, Bureau of Land Management, rejecting Native allotment application, A-054760, in part.

Set aside and remanded.

1. Administrative Procedure: Hearings -- Alaska: Native Allotments -- Rules of Practice: Hearings

   Where issues of material fact are in dispute, due process requires that an applicant for a Native allotment be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and granted an opportunity for an oral hearing before a trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for allotment.

2. Administrative Procedure: Generally -- Administrative Procedure: Hearings -- Alaska: Native Allotments -- Contests and Protests: Generally -- Hearings -- Rules of Practice: Government Contests

   Where Bureau of Land Management determines that an application for a Native allotment is invalid because the facts are not as stated in the application, Bureau of Land Management should initiate a contest proceeding pursuant to 43 CFR 4.451 to 4.452-9.

APPEARANCES: Henry W. Cavallera, Esq., Toby Thaler, Esq., Lucy M. Lowden, Esq., Alaska Legal Services, for appellant.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Evan Chukwak appeals from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated April 18, 1975, rejecting his Native allotment application, A-054760, in part.

On May 29, 1961, BLM received appellant's Native allotment application and evidence of use and occupancy for approximately 160 acres of land on the Alagnak River. Appellant asserted that the site had been his family's permanent home from August 1956 to September 1959 and was thereafter regularly used during trapping season. The evidence of occupancy noted three improvements including a six-room house.

A BLM field examination of the land embraced in appellant's application was conducted on May 21, 1962, and updated on September 26, 1973. The field reports indicated that on the land described in the application there were four clearings each with a house and out buildings. The examiners found that one of the houses and some of the surrounding lands were substantially used and occupied by appellant for at least the statutory 5 years. The other houses were identified as belonging to Peter Chukwak, Simmy Larsen, and Okalena Gregory.

On January 8, 1975, BLM notified appellant of the results of the field examinations and indicated that his allotment would be approved only as to the 8- to 10-acre parcel of land encompassing his house unless additional evidence supporting his claim to a larger allotment was submitted within 60 days from receipt of the notice. BLM had concluded that appellant had not met the exclusive use requirements of the Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), 1/ and implementing regulations, 43 CFR Subpart 2561.

Appellant thereafter submitted statements indicating that the house identified as belonging to Peter Chukwak, his father, had been owned by his brother who was deceased and was now occupied by his father. In addition, Simmy Larsen had died the previous fall, and the fourth house had been unoccupied since the owner had died a long time

1/ The Alaska Native Allotment Act was repealed, subject to pending applications, by section 18(a), Alaska Native Claims Settlement Act, 43 U.S.C. § 1617 (1976).

ago. BLM concluded that this information was not sufficient to support a conclusion that appellant had met the required use and occupancy for the lands claimed in excess of the 8-10 acres recommended for approval and issued the decision which is the subject of this appeal.

In a statement of reasons, dated July 11, 1975, counsel for appellant indicated that appellant only appeals the rejection of the land designated as belonging to Peter Chukwak and not the land surrounding the Larsen or Gregory improvements. Appellant, both in the statement of reasons and a separately signed statement, claimed that he and Peter Chukwak were "not actually in conflict" in that they both used the land surrounding the house occupied by Peter Chukwak and that the allotment application was filed to protect the entire family interest.

In May 1977 counsel for appellant submitted additional documentation in support of this appeal. These documents included:

1. An affidavit by appellant dated October 30, 1975, in which appellant claims that the other three houses on his claimed allotment have been deserted since 1958, the persons who built the homes are all deceased, no one else claims an interest in the houses, and he is the only person who has used the land since 1958.

2. An affidavit by Peter Apokedak, who has known appellant since 1964 and is familiar with the allotment, in which he also claims that the three homes have been deserted since 1958, the owners are deceased, no one that he is aware of claims an interest in them, and appellant is the only person to use the land.

3. The statement of witness, James E. Woods, dated November 17, 1976, which attests to appellants use and occupancy of the claimed land since 1940 or 1941.

4. An affidavit signed by appellant on May 12, 1977, purporting to clarify which "[1] and was under Actual Potentially exclusive use and occupancy." In this affidavit, appellant identifies the four houses, states that Simmy Larsen died in 1973, and Okalena Gregory in 1964, and describes his use and occupancy as occurring over the entire claimed parcel of land, except in the immediate vicinity of the Larsen and Gregory improvements, in the form of trapping since 1961, berry-picking since 1971, and more than 5 years residence on the lands immediately surrounding his and his brother's houses. He concludes the affidavit with the statement: "I have not seen nor was I asked concerning the paper called 'Statement of Reasons for Appeal' which was filed in my case."

The Alaska Native Allotment Act, supra, authorizes the Secretary of the Interior to allot to Alaska Natives not to exceed 160 acres of vacant, unappropriated, and unreserved nonmineral lands in Alaska for which the Alaska Native can show the required 5 years substantially continuous use and occupancy. 43 CFR 2561.0-3, 43 CFR 2561.2. Such use and occupancy

> contemplates the customary seasonality of use and occupancy by the applicant of any land used by him for his livelihood and well-being and that of his family. Such use and occupancy must be substantial actual possession and use of the land, at least potentially exclusive of others, and not merely intermittent use. [Emphasis added.]

43 CFR 2561.0-5(a).

[1, 2] In Pence v. Kleppe, 529 F.2d 135 (9th Cir. 1976), the United States Court of Appeals for the Ninth Circuit ruled that where issues of material fact are in dispute in Native allotment cases, due process requires that

> applicants whose claims are to be rejected must be notified of the specific reasons for the proposed rejection, allowed to submit written evidence to the contrary, and, if they request, granted an opportunity for an oral hearing before the trier of fact where evidence and testimony of favorable witnesses may be submitted before a decision is reached to reject an application for an allotment.

529 F.2d at 143.

Following that decision, the Board ruled that the Departmental contest procedures, 43 CFR 4.451-1 to 4.452-9, would satisfy the requirements of due process. Thus, when BLM adjudicates a Native allotment application presenting a factual issue as to the applicant's compliance with the use and occupancy requirements, BLM must initiate a contest giving the applicant notice of the alleged deficiency in the application and an opportunity to appear at a hearing to present favorable evidence prior to rejection of the application. Donald Peters, 26 IBLA 235, 241-42, 83 I.D. 308, 311-12, reaffirmed on reconsideration, 28 IBLA 153, 83 I.D. 564 (1976). The Ninth Circuit Court of Appeals has since held that the Departmental contest procedures would satisfy, at least facially, the due process requirements set forth in Pence v. Kleppe, supra. See Pence v. Andrus, 586 F.2d 733 (9th Cir. 1978).

In this case there are obvious factual discrepancies not only between appellant's assertions of use and occupancy accompanying his allotment application and the BLM field examiners' reports but also in the various submissions of appellant himself. Accordingly, we will remand this case and direct that BLM initiate contest proceedings directed to establishing the nature of appellant's use and occupancy on that portion of the claimed allotment not already recommended for approval. By this decision we do not in any way disturb BLM's finding that the 8- to 10-acre parcel containing appellant's house should be approved. We would specially request that appellant address the basis for and provide an explanation for his disavowal in the May 12, 1975, affidavit of the statement of reasons for appeal submitted by Alaska Legal Services on his behalf.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for initiation of contest proceedings.

James L. Burski
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Anne Poindexter Lewis
Administrative Judge